

Changes, Mitigation, and Exceptions Stakeholder Working Group

Permit and Change Process, Objections and Hearings Draft Recommendations

FOR DISCUSSION PURPOSES ONLY

6/14/2022

Disclaimer: These are initial draft ideas/recommendations based on the Stakeholder Working Group's (SWG) identified issues/conversations and drafted by DNRC at the request of the SWG during the last meeting. These are concepts for consideration by the SWG that will require further development and detail, and may require statute, rule and/or guidance modifications if the SWG determines that it wants to develop further. Timelines assume additional FTE would be provided to the department. * Applies to change applications.

Please use the 'suggesting' editing mode so that we can see any changes/additions made. The more each of you can share your thoughts here, the more efficient we can be with our in-person discussion time.

1. [Pre-application meeting](#)

Goal: Applicant and DNRC coordinate on the application process: steps, variances, and need for mitigation, information that DNRC is responsible for, information the applicant is responsible for, current gaps in information provided by applicant. Additionally, the applicant identifies the technical information that they want DNRC to provide (front load the information in the process).

Actions:

- Applicant outlines water needs (flow rate, volume), location (POD, well logs, source aquifer, POU, storage), purpose, period of diversion, historical use documentation*, rights for mitigation* (if applicable)
- DNRC discusses any aquifer testing requirements or measurement needs, potential variances needed, and potential need for mitigation.
- Applicant identifies the reports they want DNRC to complete.
 - Aquifer Test Report /Hydrogeologic Assessment (closed basins)
 - Stream Depletion Report (proposed consumptive use)
 - Mitigation/Aquifer Recharge Section included in Stream Depletion Report
 - Groundwater Change Report* (change in rate/timing and location of net depletion)
 - Return flow analysis*

- Evaporation calculation* (ponds/reservoirs)
- DNRC will identify if there are gaps in information provided by the applicant (e.g., Historical use: Identify what applicant is going to provide for HU, identify what Dept. is going to review for HU. List data points/resources that will be looked at for HU determination. Identify what is missing right now that is needed for HU determination.).
- DNRC provides the applicant with written documentation of the outcome of the pre-application meeting. Documentation includes a checklist of what Applicant still needs to provide in order for DNRC to complete agreed upon reports for technical analysis.

Timeline: DNRC provides applicant with written documentation/checklist from the pre-application meeting within 24 hours of meeting completion. Upon receipt of all information on checklist, DNRC will provide written confirmation of receipt of information.

Changes: Procedural/guidance

2. Pre-Application Technical Analysis

Goal: Addresses WG desire to provide information to applicant at the beginning of the application process to avoid the battle of the experts. This is a technical analysis and not a criteria analysis.

- DNRC provides a technical memo to the applicant that incorporates the requested reports identified in the pre-application meeting. Department documents the evidence and data used in the analysis.
- Technical Analysis will include information on whether an application is located in a closed basin and is likely to meet an exception to the basin closure.
- Information expires one year from delivery of the pre-application Technical Analysis.

Timeline: DNRC has 60 days to produce the pre-application Technical Analysis from the DNRC providing written confirmation of receipt of all information being provided by the applicant. Expectation is that if DNRC has everything they need, we are responsible for getting out the analysis within the 60-day time period.

WG Discussion point: The working group needs to discuss the amount of work necessary to complete these tasks and if this proposal alleviates concerns with avoiding premature criteria analyses by the department without an application being filed.

Changes: Procedural/guidance

3. Application Filed

- Applicants will have a reduced fee of \$200 for utilizing the pre-application meeting and pre-application Technical Analysis if the information applicant submitted during the pre-application has not substantively changed. If the applicant has changed information

from pre-application which changes the Department's Technical Analysis, normal fees apply.

- If the applicant chooses to not have DNRC conduct reports in the pre-application, they will be responsible for their own analyses, and DNRC will evaluate the scientific validity and address deficiencies.

Changes: none

4. Correct and Complete (85-2-302(2), MCA)

- DNRC deems application correct and complete or sends a deficiency letter.
- DNRC internal process or rules modified (36.12.1601) to clarify that correct and complete means all application materials are present, did you answer the question.

Timeline: 30 days if DNRC conducts pre-application and technical analysis; 180 days if not. Applicant has 120 days to respond to the deficiency letter. DNRC has 90 days from receipt of deficiency response to terminate or determine correct and complete.

WG Discussion point: Discussion defining correct and complete to mean all application materials are present.

Changes: procedure and/or rules modified

5. Draft Preliminary Determination (85-2-307, MCA)

Goal: Conduct the criteria assessment/substantive review.

- Criteria assessment (85-2-311, -402, MCA):
 - Incorporate the pre-application Technical Analysis
 - Physical water availability
 - Legal availability of water
 - Historical Use*
 - Adverse effect*
 - Basin closure area exceptions and compliance
 - Adequacy of diversion works*
 - Beneficial use*
 - Possessory interest*
 - Environmental Assessment (required unless the working group wants to recommend a categorical exclusion)
- DNRC issues a draft preliminary determination to grant, grant with modifications, or deny.

Timeline: DNRC has 60 days to issue draft Preliminary Determination after correct and complete determination. Waiver of the 120-day (or shortened to 60-day) timeline for a preliminary determination: Waiver of timelines can only be requested by applicant. DNRC will no longer request a waiver of statutory timelines.

Changes: Statutory change to shorten time frame for preliminary determination to 60 days. Include in statute change- the ability for applicant to waive timeline for decision.

6. Public Comment

Goal: Opportunity for the public to provide comment, allow DNRC to fix issues early on prior to going to hearing, and reduce the likelihood of litigation. Total time associated with Public Comment and Public Objection equals current objection timeframe (60 days).

- If the water right application is not withdrawn or timelines are waived by the applicant, DNRC will request public comment on the draft preliminary determination. Public comments need to describe concerns/challenges generally but do not need to rise to the level of expert testimony/information.
- If a person does not provide public comment related to objections on the criteria assessment, they are unable to object later in the process.
- DNRC provides a memo to the file addressing public comment received.
- MEPA comments on the Environmental Assessment would occur during this time.

Timeline: Public comment is open for 30 days.

WG Discussion point: is this something that the WG wants to recommend?

Changes: statute and new rules related to public comment process

7. Preliminary Determination (85-2-307, MCA)

Goal: Allows DNRC to address issues prior to going to hearing. Helps with WG concern that DNRC does not support their analysis- i.e., if there was an error made by DNRC, the Department can address it at this point.

- After the public comment period, DNRC considers comments made, consults with the applicant, and issues an updated Preliminary Determination confirming the department is proposing to grant, grant with modifications, or deny the application.

Timeline: DNRC has 30-days to consider comments made and issue a preliminary determination to grant, deny, or grant with modifications.

Changes: Changes will be part of statute and rules changes to address public comment step

8. Public Objection (85-2-308, MCA)

Goal: Allows parties who submitted public comment the opportunity to object. Applicants may also object.

- DNRC gives individual notice of the Preliminary Determination to people who submitted public comment on the criteria.
- During the objection period, any interested person who has standing, including the applicant, may object to the Department's findings and determinations.

Timeline: Serving notice of the Preliminary Determination commences a 30-day objection period.

Changes: statute and rules to take into account public comment step

9. Objections and Hearing (2-4-623, 85-2-309(1), 85-2-310(4) MCA)

Goal: does not change from current practices today.

- DNRC Water Resources Division reviews correct and complete objections; if correct and complete, DNRC reviews for validity.
- If valid, pre-hearing conference, hearing date set.
- The Office of Administrative Hearings hears the case and issues a final order.
- Hearing examiner must make own findings of fact and conclusions of law addressing objections.

Timeline: DNRC has 45 days to deem correct and complete and review for validity. Hearing scheduled 90 days from an objection from being determined as C&C

Changes: 45 day validity ruling in statute